



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary  
Office of the General Counsel

Public Health Division  
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July 27, 1995

MEMORANDUM

TO: Michael H. Trujillo, M.D.  
Director, IHS

FROM: Duke McCloud  
Senior Attorney

SUBJECT: Self-Determination Act Amendments--Applicability of  
Privacy Act to 638 Contractors' Records

After expressing concern over the potential effect of the 1994 amendments to the Indian Self-Determination Act on the applicability of the Privacy Act to tribal patient records, your April 21 memorandum requests our views on this issue. For the reasons set forth below, we are of the opinion that neither the Privacy Act nor the Freedom of Information Act applies to the patient records of 638 contractors which execute agreements under the 1994 amendments.

Section 108(a)(1) of the Indian Self-Determination and Education Assistance Act, as amended in 1994, directs that "[e]ach self-determination contract entered into under this subchapter shall . . . contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section." 25 U.S.C. 450 1(a)(1). Section 108(b) also states in part that "[a]s provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such section shall not be considered Federal records for purposes of chapter 5 of Title 5." 25 U.S.C. 450 1(b). It is declared in the aforementioned section of the model agreement that "[e]xcept for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of chapter 5 of Title 5, United States Code." 25 U.S.C. 450 1(c).

The statutory language quoted above leaves no doubt that except as specifically excluded, records maintained by a Tribe or Tribal Organization in carrying out a model 638 contract are not Federal records for purposes of chapter 5 of Title 5, USC. The one exception is for copies of 638 contractor records previously

provided to HHS (or Interior) which are required to be maintained as part of an HHS or Interior "recordkeeping system".

Chapter 5 of Title 5, USC contains two statutes which govern records of Federal agencies: The Freedom of Information Act, enacted in 1966 and known as FOIA, (5 USC 552) and the Privacy Act, enacted in 1974, (5 USC 552a).

The FOIA is a disclosure statute and applies to "records" maintained by agencies within the executive branch of the Federal Government. It requires that all agency records are to be released to the public on request except that if a record comes within the scope of one of the nine specific exemptions to mandatory disclosure, it is not required to be released. Under HHS implementing regulations, contractor records are not subject to FOIA unless they are in the possession or under the control of HHS (See 45 CFR §5.5 definition of "agency"). Hence, the FOIA position on contractor records is consistent with the provision in the model agreement that declares records of the contractor are not Federal records.

Whereas the FOIA is a disclosure statute, the Privacy Act is a confidentiality statute and applies only to Federal agencies. The Privacy Act prohibits the disclosure of any item of information about an individual in a "system of records" maintained by an agency unless the individual consents in writing or unless the disclosure comes within one of twelve exceptions to the general prohibition. In short, the Privacy Act is concerned with records about individuals which are contained in a "system of records" maintained by a Federal agency. The Privacy Act, through paragraph (m) (§552a(m)) directs that Privacy Act coverage be extended to contractors where the contractor maintains a system of records to accomplish a Federal agency function. In such instances, the agency must insert a provision in the contract requiring the contractor to comply with the Privacy Act and the HHS Privacy Act regulations (45 CFR Part 5b). Two decades ago, we advised the Public Health Service that the requirements of the Privacy Act must be made applicable to the medical records of IHS beneficiaries treated under contract.<sup>1/</sup> The provisions of the Privacy Act have been made applicable to all 638 contract executed prior to the enactment of the 1994 amendments noted above. And by agreement the 638 contractor's records were a part of the IHS Health and Medical system of records (09-17-0001) and in that sense were considered Federal records. The 1994 model 638 agreement, in our view, changes that and has, in effect, superseded §552a(m) of the Privacy Act with respect to these 638 agreements with the effect that the 638 records are no longer considered Federal records for purposes of the Privacy Act. We are of the opinion that the 1994 amendments to the Indian Self-Determination Act are inconsistent with any

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<sup>1/</sup> Memorandum, GH (Walderman) to HSA (Kugajevsky) 6/27/75.  
Accord, Memorandum GCB (Goggin) to Director IHS, 3/8/76.

effort to consider the tribal patient records Federal records subject to the Privacy Act. And we are further of the view that this interpretation is supported by the statutory language and the legislative history. A review of the rules of statutory construction and the legislative history of the provisions in question is attached.

In sum, we conclude that neither the FOIA nor the Privacy Act applies to patient records of 638 contractors which execute model agreements under the 1994 amendments. However, copies of tribal records that previously have been provided to the IHS and are required to be kept as part of any IHS or HHS system of records are Federal records subject to the Privacy Act.

A handwritten signature in cursive script, reading "Duke McCloud".

Duke McCloud  
Senior Attorney